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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 500

FENIX and SCISSON, INC., a Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Petitioner prays that this Court grant rehearing of its order of May 8, 1967 denying the Petition for Writ of Certiorari (Mr. Justice Black was of the opinion that certiorari should be granted) and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed herein by the petitioner on August 29, 1966.

REASON FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner respectfully submits that the denial of the Petition for Writ of Certiorari is inconsistent with the decision of this Court in another case rendered while the petition was pending.

At the time the Petition for Writ of Certiorari, the answer in opposition thereto and reply to such answer in opposition were filed (August to October, 1966), there was no decision of this Court construing the procedural requirements of Rule 50 of the Federal Rules of Civil Procedure insofar as such requirements apply to the instant case.

On March 20, 1967 this Court entered its opinion in *Neely* v. *Martin K. Eby Construction Co.*, ... U.S. ....., 18 L. Ed. 2d 75. The trial judge had denied the defendant's motion for a directed verdict and after the jury awarded the plaintiff a verdict, had overruled the defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. The defendant appealed to the Court of Appeals for the Tenth Circuit. The Court of Appeals held that the evidence of negligence and proximate cause was insufficient to go to the jury and therefore reversed, with instructions to the District Court to dismiss the action. 344 F. 2d 482.

On certiorari, this Court affirmed the Court of Appeals. In discussing the procedural requirements of Rule 50(b) (which petitioner assumes would include the requirement that a motion for judgment notwithstanding the verdict be on the same grounds as the motion for a directed verdict), this Court stated as follows, at page 82 of the Law Edition:

> "The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved."

In its Petition for a Writ of Certiorari petitioner herein asserted that the court below erred in not determining that the respondent had failed strictly to comply with the procedural requirements of Rule 50(b), in that respondent had alleged a different basis for its motion for judgment n.o.v. than for its motion for directed verdict. The motion for directed verdict was limited to the assertion that the failure of the acquired corporation to carry on a trade or business was conclusively established by its filing of corporate Articles of Dissolution with the State of Missouri (Petition for Cert. p. 17). In its motion for judgment n.o.v. the respondent changed its ground to allege generally that the evidence was insufficient in law to form a basis for the verdict of the jury that the petitioner's acquired corporation continued to carry on after the acquisition a trade or business substantially the same as that conducted before its acquisition by the petitioner on October 14, 1955 (Petition for Cert. p. 18). It is submitted that the shift in the basis between the motion for directed verdict and the motion for judgment n.o.v. is a patent failure to follow Rule 50(b). As this Court stated in the previously-quoted language in the *Neely* case, the decisions are quite clear that where Rule 50(b) has not been strictly complied with, there is no basis for a court to grant a motion for judgment n.o.v.

At the time that the Petition for Writ of Certiorari herein was filed by the petitioner there were no decisions of this Court unequivocally stating that the procedural re-

quirements of Rule 50(b) must be strictly complied with. The petitioner now feels that this requirement has been clearly spelled out in *Neely*. Therefore, having failed to present in its motion for directed verdict the allegation of insufficiency of evidence, the respondent could not properly appeal the denial of the motion for judgment n.o.v., resting upon these allegations to the appellate court. Petitioner respectfully submits that such conclusion is inescapable under the wording of the decision of this Court in *Neely*, and that the action of the Court of Appeals, herein is incompatible with such decision of this Court.

CONCLUSION

For the reasons set forth above and in its Petition for a Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Harry P. Thomson, Jr.

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